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No. 09-253

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IN THE

Supreme Court of the United States

HECTOR ADAMES, JR., *et al.*,
Petitioners,

v.

BERETTA U.S.A. CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF FOR *AMICI CURIAE* LEGAL COMMUNITY AGAINST VIOLENCE, COALITION TO STOP GUN VIOLENCE, AND VIOLENCE POLICY CENTER IN SUPPORT OF PETITIONERS

CHARLES M. DYKE *
ERIN M. ADRIAN
NIXON PEABODY LLP
One Embarcadero Center
18th Floor
San Francisco, CA 94111
(415) 984-8200

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF

This motion and brief are filed pursuant to Rule 37.2(b) of the United States Supreme Court. Consent to file has been granted by counsel for the Petitioner but withheld by counsel for Respondent. Counsel for Respondent received from counsel for the Petitioner timely notice on June 5, 2009, of the impending filing of *amici*'s support for Petitioner but declined then, and again in a discussion with the undersigned counsel on September 21, 2009, to consent to the filing of this brief.

Amici curiae Legal Community Against Violence, Coalition to Stop Gun Violence, and Violence Policy Center hereby move this Court for leave to file the following brief. *Amici* declare as follows:

1. Identity and Interest of the *Amici Curiae*. *Amici* are described as follows:

Legal Community Against Violence

Legal Community Against Violence ("LCAV") is a national law center dedicated to preventing gun violence. Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, LCAV is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. As an *amicus*, LCAV has provided informed analysis in a variety of firearm-related cases, including the present case in the court below and other cases under the Protection of Lawful Commerce in Arms Act ("PLCAA"). *See Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009); *Adames v. Sheahan*, 233 Ill. 2d 276, 909 N.E.2d 742 (2009); *New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).

Coalition To Stop Gun Violence

The Coalition to Stop Gun Violence is comprised of 48 member organizations working to reduce gun violence through research, strategic engagement and effective policy advocacy.

Violence Policy Center

Violence Policy Center ("VPC") is a national non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, organizations, researchers, advocates, and the general public. VPC examines the role of firearms in the United States, analyzes trends and

patterns in firearms violence and works to develop policies to reduce gun-related deaths and injuries. VPC has conducted numerous fact-based studies on a full range of gun violence issues. These studies have influenced congressional policy-making and shaped congressional debates over gun control as well as state regulation of firearms. In 2002, VPC testified on the PLCAA before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce.

2. Desirability of an *Amici Curiae* Brief. *Amici* are civic organizations actively engaged in efforts to reduce gun violence and the destructive impact it has on local communities and urban centers. Because of the *amici*'s work and expertise in gun violence prevention, they bring a unique perspective on the Illinois Supreme Court's ruling.

3. Reasons for Believing that Existing Briefs May Not Present All Issues. This brief concentrates on certain practical and jurisprudential consequences of the Illinois Supreme Court's construction of the federal statute at issue. Although the parties unquestionably are represented by highly qualified counsel, no single party can completely develop all relevant views on the questions of exceptional national importance presented by this petition, including whether Congress overstepped its bounds under the Tenth Amendment in enacting the PLCAA, and whether section 4(5)(A)(v) of the Act, codified at 15 U.S.C. § 7903(5)(A)(v), must be construed, as the Illinois Supreme Court construed it, contrary to apparent Congressional intent and so as to obliterate vested rights under state law.

4. Avoidance of Duplication. Counsel of Record for *amici curiae*, Charles Dyke, has reviewed the facts of this case and considered the Petitioner's brief to avoid unnecessary duplication. We respectfully submit that this brief presents important information concerning the constitutionality of the PLCAA that is not addressed in the Petition.

5. Consent of the Parties or Requests Therefor. The Petitioner has consented to the filing of this brief, while counsel for the Respondent declined requests for consent by both Petitioner's counsel and the undersigned.

For these reasons, *amici curiae* respectfully request that they be granted leave to file the attached brief.

Respectfully submitted,

CHARLES M. DYKE *
ERIN M. ADRIAN
NIXON PEABODY LLP
One Embarcadero Center
18th Floor
San Francisco, CA 94111
(415) 984-8200

* Counsel of Record

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BRIEF FOR *AMICI CURIAE* LEGAL COMMUNITY AGAINST VIOLENCE, COALITION TO STOP GUN VIOLENCE, AND VIOLENCE POLICY CENTER IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The interests of *amici* are set forth in the foregoing "Identity and Interest" section of the Motion of *Amici Curiae* for Leave to File Brief.[1]

[1] Counsel for Respondent received timely notice of the intent to file this *amicus* brief but declined to consent. Counsel for Petitioner also received timely notice and consented. Pursuant to Supreme Court Rule 37.6, *amici* state that this motion and brief were authored by the undersigned counsel, and that no counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this motion and brief.

SUMMARY OF ARGUMENT

There is no general federal police power. Yet the Illinois Supreme Court's construction of 15 U.S.C. § 7903(5)(A)(v) presumes the existence of one. The Illinois Court held that Congress properly could and did, through the PLCAA, establish a new federal rule dictating when firearm and ammunition manufacturers and sellers can be held liable under *traditional state-law product defect actions* for harms caused, at least in part, by defects in their products. Compounding matters, this new congressional rule consists of a prohibition against the filing or maintaining of certain traditional state-law product-defect claims, *while substituting nothing in their place*. The Illinois Supreme Court held that these features of the PLCAA posed no federalism problems under the Tenth Amendment.

The importance of this question to the continuing vitality of the bedrock Tenth Amendment principle that the federal government is one of limited, delegated powers is obvious. As construed by the Illinois court, the PLCAA provides a roadmap for every political constituency and special interest group to obtain relief against any state rule—no matter how local the concern—they find disagreeable. That is a road to the extinction of "state sovereignty."

The consequence for individuals is equally bad. In many states, including Illinois, the common law provides that an accrued cause of action is a vested right that cannot be taken away. Yet the PLCAA as construed below allows Congress, under the guise of regulating commerce, to destroy such rights *without any obligation to provide a substitute*. Nowhere in the Constitution is Congress delegated such an

awesome power. The Tenth Amendment makes plain that Congress may not presume to have it.

ARGUMENT

WHETHER CONGRESS HAS THE POWER TO WIPE OUT TRADITIONAL STATE-LAW PRODUCT-DEFECT CLAIMS WHILE REPLACING THEM WITH NOTHING IS A MATTER OF VITAL IMPORTANCE TO OUR FEDERALIST STRUCTURE.

A. The Tenth Amendment Means What It Says.

The federal government's powers are limited to those delegated by the people in the Constitution. Powers not so delegated "are reserved to the States respectively, or to the people." U.S. Const. amend. X; *see Printz v. United States*, 521 U.S. 898, 919 (1997); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); *New York v. United States*, 505 U.S. 144, 155 (1992). The states and their political subdivisions are the branches of government with principal responsibility for "maintain[ing] and regulat[ing]" the safety of the people. *Federalist No. 17* (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Throughout the history of the republic, "the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically . . . matters of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citation omitted). In recent decades, the federal government has "played an increasingly significant role in the protection of the

health of our people." *Id.* But when Congress legislates in an area "traditionally occupied" by the states, such as tort law, there is a "'presumption against'" displacement of "'state police power regulations.'" *Id.* Indeed, given the historic primacy of state regulation of matters of health and safety," and the status of states as "individual sovereigns" in our federal system, the Court has "long presumed that Congress does not cavalierly pre-empt state law causes of action," particularly when it comes to state tort law remedies. *Id. See generally Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

B. The PLCAA Is Easily And Properly Construed To Preserve Many Product Defect Claims.

The court below never considered these principles in construing the language of the PLCAA. Instead, it simply construed an undefined term—the word "volitional" in 15 U.S.C. § 7903(5)(A)(v)—in a vacuum to give the statute its farthest displacing reach with respect to state-law product-defect claims.

The statute forbids the filing of any "qualified civil liability action" in federal or state court, and mandates the dismissal of any such pending action. 15 U.S.C. § 7902. A "qualified civil liability action" is defined as a civil action against a manufacturer or seller of a "qualified product" (*i.e.*, firearms or ammunition) for harms "resulting from the criminal or unlawful misuse" of the product. *Id.* § 7903(5)(A). Certain actions otherwise within this definition are specifically carved out, including an

> action for death, physical injuries or property damage resulting directly from a defect in design

> or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a *volitional* act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.

15 U.S.C. § 7903(5)(A)(v) (emphasis added). The Illinois Supreme Court interpreted "volitional" to mean "choose and determine to . . . pull the trigger" rather than intending to cause the discharge. *See* App. 42a, 46. This led the Court to conclude that Billy's accidental shooting of Josh was a criminal act covered by the Act. *Id.*

Had the Illinois Supreme Court considered the federalism principles captured in the Tenth Amendment, along with Congress's repeatedly stated intent in the PLCAA to bar only "novel" actions for harms "solely caused" by criminal acts,[2] it easily could and

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[2] The actions that Congress had in mind were those on behalf of municipalities or other governmental units seeking monetary relief for the cost of police and emergency medical teams to respond to incidents of gun violence. *See, e.g., Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000) (plaintiff county alleged public nuisance, negligent entrustment, and negligence in marketing and distribution against defendant firearm manufacturers), plaintiff's claims dismissed and dismissal affirmed by U.S. Circuit Court of Appeals at 273 F. 3d 536 (3d Cir. 2001); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000) (city and certain civic organizations brought claims against firearms manufacturers for negligent distribution and public nuisance), plaintiff's claims dismissed, dismissal affirmed by U.S. Circuit Court of Appeals at 277 F.3d 415 (3d Cir. 2002); *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (Conn. 2001) (municipality brought suit against members of the firearms industry for violation of the Connecticut Unfair Trade Practices

should have construed "volitional" to require criminal intent, not mere affirmative conduct. Had it done so, actions not involving criminal intent, such as Petitioners', would have been preserved. This is certainly how the PLCAA's principal sponsor thought the statute would be applied. *See* Petition at 31 (quoting Senator Craig's floor statement that even if a person who discharges a defective gun is "technically in

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Act, public nuisance, civil conspiracy, and unjust enrichment based on, *inter alia*, increased cost of police and other services due to use of firearms in criminal activities); *Penelas v. Arms Technology, Inc.*, 778 So.2d 1042 (Fla. App. 2001) (county brought suit against gun manufacturers for negligence, strict liability for defective products, public nuisance, and ultrahazardous activities, to recover cost of responding to gun incidents); *People of New York v. Sturm, Ruger & Company, Inc.*, Case No. 402586/2000, (N.Y. Civ. Ct. 2003) (attorney general brought suit on behalf of the people of the State of New York against gun manufacturers for public nuisance arising from the manufacture and distribution of handguns that are illegally possessed and used within the state); *City of New York v. Arms Technology, Inc.*, Case No. CV 00 3641 (E.D.N.Y. 2000) (suit by city against multiple manufacturers and dealers for public nuisance, negligent and intentional entrustment, negligent design, negligent marketing and distribution, defective design, inadequate warnings, deceptive trade practices, false advertising, indemnity, restitution, unjust enrichment, and reimbursement of federal and state Medicaid expenditures); *City of Gary, Indiana v. Smith & Wesson Corp.*, Cause No. 45D029908CT 0355, (Ind. Super. Ct. 2001) (city filed suit against manufacturers and dealers for public nuisance, negligent distribution, marketing, and failure to warn, and negligent design); *City of Chicago v. Beretta U.S.A. Corp.*, No. 98-CH015596, (Ill. Cir. Ct. Cook County 1998) (city and county sued manufacturers, distributors, and dealers of handguns on public nuisance theory, seeking compensation for the costs of emergency medical services, law enforcement efforts, the prosecution of violations of gun control ordinances, and other related expenses).

violation" of a criminal law, "that alone would not bar" a defective-product lawsuit). Instead, the court construed the law contrary to evident Congressional intent and the federalist principles that underlie our government's structure.

C. This Court Should Decide Whether the PLCAA's Product-Defect Exclusion Unduly Interferes with State Sovereignty by Displacing Traditional Product-Defect Claims that Are Vested Under State Law and Replacing Them with Nothing.

In many states, including Illinois, a cause of action becomes a vested property right when it accrues or is filed, precluding the state government thereafter from taking it away. *See Johnson v. Halloran*, 194 Ill. 2d 493, 500-01 (2000); *Link by Link v. Venture Stores, Inc.*, 286 Ill. App. 3d 977, 979 (1997).[3] Whether the U.S. Constitution authorizes Congress to destroy such state-created rights without providing a substitute is a vital and unsettled question.

As a general proposition, Congress lacks the authority to make laws that retroactively abrogate vested rights. *E.g., Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 584-90 (1935). And as this Court explained in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the "hallmark of property, the Court has emphasized, is an individual entitlement

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[3] Examples of other states include Arizona, *see Hall v. A.N.R. Freight Sys.*, 149 Ariz. 130, 140, 717 P.2d 434, 444 (1986) (en banc), North Carolina, *see Bolick v. American Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982), and Wisconsin, *see Smith v. Sno Eagles Snowmobile Club, Inc.*, 823 F.2d 1193, 1195 n.4 (7th Cir. 1987).

grounded in state law, which cannot be removed except 'for cause.'" *Logan*, 455 U.S. at 430. The federal courts of appeals have held, however, that while a plaintiff has a property right in a tort cause of action, that right does not vest until the claim is reduced to final judgment. *E.g., Hammond v. United States*, 786 F.2d 8, 11-12 (1st Cir. 1986) (collecting and discussing cases); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009).

These pre-PLCAA federal cases upholding the retroactive elimination of state-law tort and other claims involved statutory schemes in which Congress replaced the preempted laws with either a reduced remedy or an alternative scheme for redress. *E.g., Hammond*, 786 F.2d at 11-12; *Ileto*, 565 F.3d at 1150 (Berzon, J., dissenting) (discussing cases). The PLCAA, by contrast, is different because it completely wipes out certain claims, including Petitioner's, *with no alternative form of redress to replace them*. *Ileto*, 565 F.3d at 1150 (Berzon, J., dissenting) (arguing that the PLCAA at the least should be evaluated under a heightened scrutiny standard). This has particularly troubling Tenth Amendment implications, since the gun industry is outside the jurisdiction of the federal Consumer Product Safety Commission and beyond the reach of any other agency that might mandate safety standards. *See* Consumer Federation of America, *Buyer Beware: Defective Firearms and America's Unregulated Gun Industry*, at 5 (2005) *available at* http://consumerfed.org/topics.cfm?section=Health%20and%20Safety&topics=guns (last accessed September 25, 2009).[4]

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[4] The federal Bureau of Alcohol, Tobacco, Firearms and Explosives licenses manufacturers, dealers and importers but has no authority to prescribe safety standards.

The PLCAA is made all the more obnoxious by the fact that it accomplishes its displacement of state product-defect laws through the unconstitutional device of a conclusive presumption. Section 7903(5)(A)(v) provides that "where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." This mandates a conclusive presumption that any volitional act that constitutes a criminal offense is the sole cause of harm, even though under common law tort principles both causes—the defect and the volitional act that constitutes a criminal offense—may be considered in determining whether liability is properly imposed on both the manufacturer of the defective product and the actor who discharged the firearm. *See* Restatement (Second) of Torts §§ 430-453, 501, 870 (1965); Restatement (Third) of Torts: Products Liability § 15 (1998); *see also Campodonico v. State Auto Parks, Inc.*, 10 Cal. App.3d 803, 807-08, 89 Cal. Rptr. 270 (1970); *McConnell v. Casco, Inc.*, 238 F. Supp. 2d. 970, 985 (S.D. Ohio 2003). Statutes that create arbitrary presumptions and deny affected parties a fair opportunity to rebut them are unconstitutional. *See Carella v. California*, 491 U.S. 263 (1989) (proof of failure to return rental vehicle yields conclusive presumption of theft); *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639 (1929) (railroad deemed negligent in collisions between train and auto at grade crossing).[5]

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[5] *See also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (pregnant teachers conclusively presumed to be unable to continue working during pregnancy); *Vlandis v. Kline*, 412 U.S. 441 (1973) (college tuition system denying persons fair opportu-

Whether Congress properly can effect the wholesale elimination of state-law product-defect claims, in such an arbitrary fashion and without providing a substitute remedial scheme, under the Tenth Amendment is a question of great national importance that this Court should decide.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES M. DYKE *
ERIN M. ADRIAN
NIXON PEABODY LLP
One Embarcadero Center
18th Floor
San Francisco, CA 94111
(415) 984-8200

* Counsel of Record

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nity to prove residency); *United States Dep't of Agriculture v. Murray*, 413 U.S. 508 (1973) (welfare disqualification provision lacking individualized determinations); *Heiner v. Donnan*, 285 U.S. 312, 325 (1932) (transfers made within two years prior to decedent's death deemed to have been made in contemplation of death); *Hoeper v. Tax Com. of Wisconsin*, 284 U.S. 206, 215 (1931) (requiring wife's income to be added to husband's for purposes of calculating husband's income tax); *Manley v. Georgia*, 279 U.S. 1 (1929) (all bank insolvencies deemed fraudulent); *Bailey v. Alabama*, 219 U.S. 219 (1911) (conclusive presumption of fraud upon breach of personal services contract).